IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5348 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE D.A.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MODERN TERRY TOWELS LTD

Versus

GUJARAT ELECTRICITY BOARD

Appearance:

MR TUSHAR MEHTA for Petitioner No. 1

MR AD OZA for Respondent No. 1

..... for Respondent No. 2-3

CORAM : MR.JUSTICE D.A.MEHTA

Date of decision: 01/08/2002

ORAL JUDGEMENT

1 Rule. Mr.A.D.Oza, learned Advocate appears and waives service on behalf of respondent-GEB. As the pleadings are complete, by consent of both the sides the matter has been heard and is being disposed of finally.

2 The petitioner, a Company, duly registered under the provisions of the Companies Act,1956, is engaged in the business of manufacturing 100% cotton towels, within the territorial jurisdiction of Sanand Sub-Division of the Gujarat Electricity Board (for short 'the Board'). The Board supplies electricity to the petitioner exclusively by way of a separate feeder having separate meters at both the ends viz. Sub-station from which the power is supplied and the point at which the power is received i.e.at the petitioner's installation. The petitioner is a high tension consumer of the Board having HT.Consumer No.17263. The petitioner's contracted demand is 2400 KVA. The petitioner is provided with special electric meter known as Static meter or Trivecto meter which has inbuilt anti-tampering device.

3 On 18.1.2002 a supplementary bill for a sum of Rs.5,68,43,311.20 was issued stating that the same was against installation checking dated 24.12.2001 and Lab inspection which was jointly carried out on 17.1.2002. On the same date the electric supply was disconnected. Upon the petitioner depositing a sum of Rs. 30 lacs the electricity was restored on 28.2.2002. The petitioner preferred an appeal before the Appellate Committee under Condition no.34 of the Conditions and Miscellaneous Charges For Supply of Electrical Energy (Conditions) raising several contentions to the effect that there was no evidence to infer the theft alleged against the petitioner. The Appellate Committee on 16.04.2002 (Annexure "A") dismissed the appeal of the petitioner in principle but granted some relief as regards the assessment and computation. The Board thereupon issued a revised supplementary bill dated 8.5.2002 for a sum of Rs.3,35,34,291.20. In the aforesaid circumstances the following reliefs have been prayed :

"(A) This Hon'ble Court be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction may kindly be granted quashing and setting aside the impugned order at Annexure-A in so far as the appeal filed by the petitioner is partly dismissed.

(B) This Hon'ble Court be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction may kindly be granted quashing and setting aside the impugned supplementary bill and revised supplementary bill declaring the same to be

unjust, illegal, arbitrary and without jurisdiction and directing the respondents, their officers, agents and servants to refund the amount paid by the petitioner with commercial rate of interest.

(C) This Hon'ble Court be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction may kindly be granted declaring that the order passed by the Appellate Committee of the Board suffers from the vice of non-application of relevant facts and misreading of provisions of law and the facts placed before it and thus illegal, arbitrary and violative of Articles 14 and 19 of the Constitution of India.

(D) Your Lordships will be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction, directing the respondent-Board to produce before this Hon'ble Court the details viz.(1) locational details of all 5 seals provided on PT Control on 3rd October,1993, (2) installation checking and MRI reports of the parallel meter i.e. Sanand GSS MTTL, feeder meter, (3) copy of sealing register of laboratory of petitioner's static meter installed near the petitioner's premises on 12th September 1995.

(E) This Hon'ble Court be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction may kindly be gratned declaring Condition No.34 framed by the Board to be illegal, arbitrary, irrational and violative of Articles 14 and 19 of the Constituion of India".

4 On behalf of the petitioner Mr.K.B.Trivedi, learned Senior Counsel submitted that the order of the Appellate Committee was bad in law in as much as various contentions raised before it have not been dealt with. It was submitted that the petitioner had made various written requests to the respondent Board commencing from letter dated 22.1.2002 and ending with letter dated 6.3.2002 calling upon the Board to provide data which was in the custody of the Board so as to prove bonafides of the petitioner, but the Board has not supplied the said data resulting in violation of principles of natural justice. Elaborating on this contention it was submitted that in light of the fact that there were parellel meters

installed at Sanand sub-station and the petitioner's factory premises, the petitioner had requested for data like readings of the meter located at Sanand Sub-station, monthly figures of power dispatched from Sanand Sub-division since September,1995, the reports of periodic inspection and MRI data, certified copy of Sanand Sub-station Logbook of meter readings as well as meter sealing register etc. It was further submittted that in the MRI data provided by the Board no reversal record was noticed which would go to show that there was no tampering with the wiring of the meter and therefore the readings recorded during the disputed period reflected correct readings.

5 As against this, on behalf of the Board it was submitted that this was a clear case of theft of power and this Court should not interfere. That the petitioner had tampered with terminal cover seal of the meter kept inside the metal meter box, that the nuts inside the P.T.Trolley were loose and as per the laboratory report it was apparent that the seals had been changed and the meter had been tampered with. Thus, it was submitted that the entire case involved disputed questions of fact wherein it was necessary to lead evidence and for this purpose it would be open to the petitioner to file a suit. That, it was incorrect on the part of the petitioner to contend that the Appellate Committee had not addressed the issue in the manner it was required to do and, hence, the petition was required to be rejected.

6 The order of the Appellate Committee dated 16.4.2002 has primarily upheld the charge of power theft by holding that as per the checking sheet dated 24.12.2001 it is mentioned that seal wire of TVM meter was found broken; that the seal wire provided on MMB Window was also found broken; that all the four seals provided on TVM meter are sealed with Galvanized iron wire whereas the seal wire provided on terminal cover was that of stainless steel whcih is a "doubtful point". The Appellate Committee also records that the laboratory test was also taken and found O.K. Thereafter, another checking was carried out on 17.1.2002, wherein it was observed that Seal wires of TVM meter, terminal cover and meter body seals differed from each other; that the wiring of PT secondary inside PT Trolley was found loose. Accordingly, all the seals from the MMB Window, metering panel , terminal cover, MMB etc. were collected along with metering cable and TVM meter for detailed inspection in the laboratory. That as per joint inspection report of 17.01.2002 at the factory site an Accu check test was taken. That in one of the seals provided on the meter

body a link indicating male and female part was broken. That one of the nuts on the right hand side stud of the PT secondary was missing while the nuts on the middle and the left hand side were loose. On 17th January,2002 itself at 8.00 p.m. laboratory inspection was carried out wherein it was observed that seal wire of the seal provided on MMB was broken. That after opening the Window on the MMB one could easily insert hand and reach the terminal cover. That out of 20 plastic seals, in six seals the connecting link of male and female part were broken whereas in 14 seals this link was intact. On the basis of the aforesaid finding it is stated that

> "All the points mentioned above indicate that the appellant's contention that they have not played any mischief with the metering system cannot be accepted."

7 As regards the contention of the petitioner before the Appellate Committee that the respondent Board had not provided them with vital data which was requested for, the appellate committee records that Executive Engineer had supplied data pertaining to consumer premises and all the available data was given to them. Therefore, according to the appellate committee the said contention was not found acceptable. As regards the contention that the data regarding reading of meter installed at the sub-station not having been supplied to the consumer the appellate committee records that according to the Executive Engineer of the Board there was no possibility of theft of power at Sub-station end but the seals provided on terminal cover of the meter at Sub-station end and the panel lock seals were found broken. Thus, according to the Executive Engineer it would not be possible to compare as regards the discrepancy as contended by the petitioner but there was crystal clear evidence as regards theft of electrical energy. This submission of the Executive Engineer has been accepted by the Appellate Committee without assigning any reason.

8 One of the contentions raised by the appellant before the appellate committee was regarding Accu check test performed on 24.12.2001 and this is how the said contention has been reproduced and dealt with by the appellate committee :

> "The appellant has also contended that the Dy.Engr.(Lab) GEB, Bavla noticed on 24th December 2001, that one of the twisted wires of the MMB seal was broken. GEB officer had performed Accu

Check to satisfy herself about the proper function of the meter. She also tested the meter and the load was specified with the functioning of the meter. She had made a remarks that "meter tested and found OK". This fact clears the bona-fide of the appellant that they have not played any alleged mistake with the metering and at that time, the meter was showing the correct reading.

Regarding this fact, there is no dispute . However, the officers of the Respondent Board had wrapped and removed that meter for laboratory test. Further more, the load test also had been carried out, which has been discussed elaborately in the above paragraphs by us."

9 In relation to the wiring of the studs in the PT Trolly and the loosening of the nuts the appellant raised the following contention, the Executive Engineer submitted thus before the Appellate Committee and this is how the appellate committee deals with the same :

Submissions :

"However, the wiring of all the studs were found properly affixed with the studs. During the laboratory inspection, it was found that all the seals were found in tact and the seal wires were also found in tact. It is strange that the trolley cover was not opened and the nuts could be loosened. Since the seal on PT trolley were found in tact, contention to the GEB officers that they would have loosened the nut from the stud could not be substained any more as it is impossible to open the terminal cover of the PT trolley. They have contended that the probable cause of loosening the nuts in oil chamber of PT trolley as mentioned by Shri SS Malpani, on 17.2.202, may be due to the effect of continuous vibration occurring in adjacent plant building and major earth quake occurred in on 26th January 2001. The nuts and connection were checked only on 17th January 2002 since release of power connection by GEB on 3rd October 1993, i.e. after a period of 8 years.

So far as this contention of the appellant is concerned, the Executive Engineer informed the Committee Members that it is true that it is not possible to tamper with a PT terminal and all seals were in tact. But, it is suspected that the seals provided on top cover of the PT might have been tampered and top cover of the PT might have been opened."

Finding :

"The appellant's contention regarding loosening of nut in PT trolley due to vibration is not acceptable and all other seals and trolley nuts are in tight position, how only nuts provided on PT terminal can become loose. Further, as informed by GEB personnel that the room, which the PT is installed, is not just adjacent to the place where there are excessive vibration. There is small road also between these two rooms. Further more, the effect of earth quake can not be that serious that nuts provided on PT terminal and also emerged in or will get loose".

10 Therefore, if one considers the findings of the appellate committee it is stated in relation to different wires used on different seals as "doubtful point". Similarly once again while referring to joint inspection report in relation to the same discrepancy between the seal wires the appellate committee states that "it is suspicious to note that though all the five, seals were applied at a time, the seal wire of body and terminal cover are different". In relation to accu check test carried out on 24.12.2001 the appellate committee states the result of the said test cleared the bonafide of the appellant that it had not played any alleged mistake (mischief ?) with the meter and at that time, the meter was showing correct reading. "Regarding this fact, there is no dispute". The appellate committee further states that by opening the window of metal meter box it was possible to tamper with the terminal cover by putting a hand through the window which is approximately 4"x4". As already seen herein before while dealing with the aspect of wiring of the loose studs inside the PT trolley, the appellate committee after recording the submission of the Executive Engineer in the following words :

"That it is true that it is not possible to tamper with a PT terminal and all seals were intact":

goes on to accept the subsequent inference by recording in the following words :

"But it is suspected that seals provided on top cover of the PT might have been opened".

11 Therefore, if one reads the order as a whole it is apparent that the appellate committee has proceeded on various doubts, suspicions and conjectures when it itself states that it "is doubtful", "its suspicious", "could be tampered with", "tampering is possible", "it is suspected", "might have been tampered", "might have been opened", etc. Such an order cannot be allowed to stand.

12 In number of cases the Court has come across the charge of theft or malpractice against consumers. The Board and the Appellate Committee have been acting in a very high handed and callous manner. Atleast the appellate committee is not expected to function in a manner which gives the impression that the dice is loaded against the consumer from the word "go". It is expected that the appellate committee, though a creature of the statute, acts in an impartial manner where it is dealing with serious charges of theft and malpractice.

13 It is necessary to understand what is the concept of malpractice and theft of energy. This has become necessary as in number of matters the learned Advocate appearing on behalf of the Board relied on Condition No.34 of the Conditions without appreciating what Condition No.34 stipulates. The said condition deals with payment after assessment of the value of the energy dishonestly used/consumed; and the latter portion pertains to appeal procedure. Condition No.34 does not deal with either malpractice or theft.

14 'Malpractice' and 'Theft of Energy' have been respectively defined vide Condition Nos. 33A and 33B of the Conditions and read as under :

"33.A Malpractice and Theft of Energy.

(a) Malpractice

Malpractice shall mean contravention by the consumer of any of the provision of the I.E.Act,1910 Electricity (Supply) Act,1948 or Indian Electricity Rules,1956 or of any other law governing the supply and use of Electricity and the rules framed thereunder as also the contravention of any of the provision of the

Board's 'COndition and Miscellaneous Charges for Supply of Electrical Energy' or any of the terms and conditions of the contract governing the supply of electricity by the Board to the consumer and shall in particular include the following case :

(a) The supply of electricity by a consumer to any other person whose supply has been disconnected by the Board for any reason.

(b) Exceeding the contracted load by a consumer without the specific permission of the Board.

(c) Unauthorised addition, alteration and/or extension to the consumer's electrical installation without the permission of the Board.

(d) Using supply by a consumer from the service which has been disconnected by the Board for any reason.

(e) Supply of energy to any other person without the permission of the Board.

33. B Theft of Energy

Any consumer who dishonestly abstracts, consumes or uses any energy shall be deemed to have committed theft within the meaning of the Indian Penal Code and the existence of artificial means for such abstraction shall be prima facie evidence for such dishonest abstraction."

15 The Board has also framed regulation known as Gujarat Electricity Board Prevention of Theft of Energy and Malpractices (by consumers) Regulations,1976. These regulations have been framed in exercise of powers conferred by Section 79(j) and Section 79(k) of the Electricity (Supply) Act, 1948. The terms 'Malpractice' and 'Theft of Energy' have been defined in the said Regulation as follows :

vi) 'Mal-practice' shall mean contravention by the consumer of any of the provisions of the I.E.Act,1910, Electricity (Supply) Act,1948 or Indian Electricity Rules,1956 or of any other law governing the supply and use of electricity and the rules framed thereunder as also the contravention of any of the provisions of the Board's Conditions and Miscellaneous charges for

supply of Electrical Energy" or any of the terms and conditions of the contract governing the supply of electricity by the Board to the consumer and, without prejudice to the generality of the said expression, shall also include the following cases.

a) The supply of electricity by a consumer to any other person whose supply has been disconnected by the Board for any reason.

b) Exceeding the contracted load by a consumer without the specific permission of the Board.

c) Unauthorised addition, alteration and/or extension to the consumer's electrical installation without the permission of the Board.

d) Using supply by a consumer from the service which has been disconnected by the Board for any reason.

e) Supply of energy to any other person without the permission of the Board.

vi) xxx xxx xxx

vii) "Theft of energy" means dishonest abstraction, consumption or use of energy by any person by whatsoever means."

16 In the Indian Electricity Act,1910 part IV which deals with General matters, in the sub-part containing provision for Criminal Offence and Procedure Section 39 (Theft of energy) and Section 44 (Penalty for interference with meters or licensee's works and for improper use of energy) read as under :

"39.Theft of energy. -Whoever dishonestly abstracts, consumes or uses any energy shall be punishable with imprisonment for a term which may extend to three years, or with fine which shall not be less than one thousand rupees, or with both; and if it is proved that any artificial mean or means not authorised by the licensee exist for the abstraction, consumption or use of energy has been dishonestly caused by such consumer."

"44.Penalty for interference with meters or licensee's works and for improper use of energy.

- Whoever -

(a) connects any meter referred to in Sec.26, sub-section (1), or any meter, indicator or apparatus referred to in Sec.26, sub-section (7), with any electric supply-line through which energy is supplied by a licensee, or disconnects the same from any such electric supply-line or

(aa) unauthorisedly re-connects any meter referred to in sub-section (1) of Sec. 26, or any meter, indicator or apparatus referred to in sub-section (7) of Sec.26, with any electric supply-line or other works, being the property of the licensee, through which energy may be supplied, when the said electric supply-line or other words has or have been cut or disconnected under sub-section (1) of Sec.24; or

(b) lays, or causes to be laid, or connects up any works for the purpose of communicating with any other works belonging to a licensee : or

(c) maliciously injuries any meter referred to in Sec.26, sub-section (1), or any meter, indicator or apparatus referred to in Sec.26, Sub-section (7), or willfully or fraudulently alters the index of any such meter, indicator or apparatus, or prevents any such meter, indicator or apparatus from duly registering; or

(d) improperly uses the energy of licensee;

[shall be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to five thousand rupees, or with both], and in the case of a continuing offence, with a daily fine which may extend to [fifty] rupees; and [if it is provided that any artificial means exist] for making such connection as is referred to in Cl.(a) [or such re-connection as is referred to in Cl.(aa)] or such communication as is referred to in Cl.(b), or for causing such alteration or prevention as is referred to in Cl.(c) or for facilitating such improper use as is referred to in Cl.(d), [and that] the meter, indicator or apparatus is under the custody or control of the consumer, whether it is his property or not. [it shall be presumed, until the contrary is proved] [that such connection, reconnection, communication] alteration, prevention or improper use, as the

case may be, has been knowingly and wilfully caused by such consumer".

17 These sections provide for punishment in case of dishonest consumption of energy amounting to theft or improper use of energy by interfering with the meter. As both the provisions go to show the offences are distinct from each other and the punishment prescribed also vary. These sections further go to show that the definition of Theft of Energy given in Condition no.33B of the Conditions would also be applicable for the purpose of launching prosecution for the stated offences. Hence, the appellate committee is necessarily required to be absolutely sure before recording a finding that the consumer had committed theft of energy.

18 The definition of 'Theft of Energy' as laid down in Condition No.33B of the Conditions specifically states that any consumer who dishonestly abstracts, consumes or uses any energy shall be deemed to have committed theft within the meaning of the Indian Penal Code and the existence of artificial means for such abstraction shall be prima facie evidence for such dishonest abstraction. This takes us to the provisions of Indian Penal Code wherein Section 24 defines 'Dishonestly' and Section 25 defines 'Fraudulently'. 'Theft` is defined under Section 378 while punishment for theft has been prescribed by Section 379 of the Indian Penal Code.

19 Section 378 of the Indian Penal Code stipulates that whenever any movable property is dishonestly intended to be taken out or is taken out of the possession of any person without that person's consent, on doing so, such other person is said to commit theft. In the case of a consumer who is supplied electricity by the Board it is apparent that the consumer is required to pay for the electricity consumed. If this is the situation, the Board must be alive to the fact that it will have to show that there was consumption or use of energy in a dishonest manner i.e. power which is the property of the Board is dishonestly consumed or used by the consumer without the consent of the Board.

20 The meaning of 'Dishonestly' as defined by Section 24 of the Indian Penal Code goes to show that whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing dishonestly. Similarly term 'Fraudulently' is defined by Section 25 of the Indian Penal Code to mean a person is said to do a thing fraudulently if he does that thing with intent to defraud

but not otherwise. It is also necessary to take into consideration the dictionary meaning of the word 'Dishonest'. The Concise Oxford Dictionary, Ninth Edition states thus :

> "dishonest (of a person act, or statement) fraudulent or insincere. 'dishonestly' adv.[Middle English from Old French dehoneste (as dishonest)."

Therefore, the concept of fraudulent intention is incorporated within the meaning of the word 'dishonest'. In other words 'dishonest' means a fraudulent or insincere act of a person.

21 The definition of 'Theft of Energy' as provided in Condition No.33B of the Conditions states in the later portion that the existence of artificial means for abstraction shall be prima facie evidence of dishonest abstraction. Therefore, the principal portion of the definition stipulates that once it is established that there is dishonest consumption or use of energy the consumer will be deemed to have committed theft within the meaning of Indian Penal Code, while the later portion enacts a Rule of Evidence by shifting the burden on the consumer, once existence of artificial means for abstraction is found. The language employed is : "prima facie evidence".

22 In the case of Jagannath Singh alias Jainath Singh Vs. B.S.Ramaswamy (now Krishna Murthy) reported in AIR 1966 SC 849 the Supreme Court was called upon to decide the scope and meaning of Section 39 of the Indian Electricity Act,1910 as it existed before amendment by Act 31 of 1986. The previous section as it existed has been reproduced in the reports at page 851 :

> "Whoever, dishonestly abstracts, consumes or uses any energy shall be deemed to have committed theft within the meaning of the Indian Penal Code; and the existence of artificial means for such abstraction shall be prima facie, evidence of such dishonest abstraction".

and thereafter this is what has been laid down by the Apex Court :

> Whoever abstracts or consumes or uses electrical energy dishonestly commits a statutory theft. The theft may be proved by direct or circumstantial evidence. Direct evidence of the theft is rarely forthcoming. To facilitate proof

of the theft, the section provides that the existence of artificial means for such abstraction is prima facie evidence of such dishonest abstraction. We think that the word 'abstraction' should be construed liberally and in the context of S.39 it means taking or appropriation. Energy may be dishonestly abstracted by artificial means or unauthorised devices. For instance, energy before it passes through a consumer's meter may be abstracted from the main of the electric company by an unauthorised wire connecting the main with the private terminal, the connecting wire is the artificial means for abstraction. Again, by tampering with the meter and causing it to record less than the units actually passing through it, the consumer may take the unrecorded energy without paying for it. The tampering of the meter and the taking of the unrecorded energy are unauthorised by the contract with the electrical company, the unauthorised taking is an abstraction and the crippled meter is an artificial means for abstraction.

(7) The effect of the last part of S. 39 is that the existence of the unauthorised means for abstraction is prima facie evidence of dishonest abstraction by some person. The special rule of evidence goes no further. The prosecution must prove aliunde that the accused made the abstraction. The fact that the accused is in possession and control of the artificial means for abstraction coupled with other circumstances showing that he alone is responsible for the abstraction may lead to the inference that he is guilty of the dishonest abstraction".

Thus, as can be seen Section 39 of the Act of 1910 as was existing upto 1986 is verbatim in terms the definition of 'Theft of Energy' provided in Condition No.33B of the Conditions. Therefore, the aforesaid findings on interpretation of the erstwhile Section 39 would apply with equal force to the interpretation of Condition No.33B of the Conditions.

23 The contention raised on behalf of the Board that as the meter which records consumption of electricity is situate within the premises of consumer it is for the consumer to show that he has not committed any theft of power requires to be stated only to be rejected.

Section 26 of the Indian Electricity Act, 1910 as is relevant for the present reads as under :

26.Meters.- (1) In the absence of an agreement to the contrary, the amount of energy supplied to a consumer or the electrical quantity contained in the supply shall be ascertained by means of a a correct meter, and the licensees shall, if required by the consumer, cause the consumer to be supplied with such a meter :

Provided that the licensee may require the consumer to give him security for the price of a meter and enter into an agreement for the hire thereof, unless the consumer elects to purchase a meter.

(2) Where the consumer so enters into an agreement for the hire of a meter, the licensee shall keep the meter correct, and , in default of his doing so, the consumer shall, for so long as the default continues, cease to be liable to pay for the hire of the meter.

(3) Where the meter is the property of the consumer, he shall keep the meter correct and in default of his doing so, the licensee may, after giving him seven days' notice, for so long as the default continues, cease to supply energy through the meter".

xxx xxx xxx

"Explanation - A meter shall be deemed to be 'correct' if it registers the amount of energy supplied, or the electrical quantity contained in the supply, within the prescribed limits of error, and a maximum demand indicator or other apparatus referred to in sub-section (7) shall be deemed to be 'correct' if it complies with such conditions as may be prescribed in the case of any such indicator or other apparatus."

The Section which deals with meters provides that the licensee i.e. the respondent Board herein, shall supply the consumer with meter and the consumer shall give security for the price of the meter. The meter will be supplied by entering into an agreement for hire thereof unless the consumer opts to purchase the meter. However, sub-section (2) specifically states that it will be obligation of the licensee to keep the meter correct

and in case the licensee defaults in doing so the consumer shall be entitled to desist from paying hire charges till the default continues. In contrast sub-section (3) provides that where the meter is the property of the consumer the obligation to keep the meter correct will be of the consumer and upon the consumer committing a default in doing so , the licensee may, after due notice cease to supply energy through the meter. The Explanation provides as to how the meter shall be deemed to be correct. Therefore, the submission on behalf of the respondent that it is for the consumer to show that he has not committed any theft of power because the meter is located within the premises of the consumer cannot be sustained.

24 There is one more aspect of the matter. Condition No.22 of the Conditions provides for entering into a formal contract or a deemed contract once the supply of electricity has commenced. The respondent Board cannot lay down any term in such agreement which is contrary to the statutory provisions under the Act and the Rules. Therefore, onus to show that no theft of power is committed by the consumer cannot be shifted by virtue of an agreement on the consumer on the basis of the location of the meter. As already stated the onus will have to be prima facie discharged by the respondent Board.

25 The Board may, in a given situation, be able to raise a prima facie presumption against consumer by virtue of the location of the meter, but nonetheless onus to show that the consumption is dishonest has to be discharged by the Board. The appellate committee is necessarily required to bear this aspect in mind while deciding the appeals of the consumer before it. It is necessary for the appellate committee to appreciate that by virtue of such charge levelled against a consumer the consequences that flow therefrom are : disconnection of power supply, the consumer being charged at a higher rate, claiming compensation by way of reconnection charge etc. which are by their very nature harsh and may lead to financial ruin in case of commercial consumers. Furtheremore, as stipulated in Condition No.34 of the Conditions a consumer is not entitled to appeal before making pre-deposit of the stipulated sums of the supplementary bill. In other words, the right of appeal is hedged by pre-requisite condition of pre-deposit.

26 The Indian Electricity Rules,1956 have been framed in exercise of the powers conferred by Section 37 of the Indian Electricity Act,1910. Rule 56 of the said

Rules deals with sealing of a meter and cut outs and reads as under :

56. Sealing of meters and cut-outs. - (1) A supplier may affix one or more seals to any cut-out and to any meter, maximum demand indicator, or the apparatus placed upon a consumer's premises in accordance with Section 26, and no person other than the supplier shall break any such seal.

(2) The consumer shall use all reasonable means in his power to ensure that no such seal is broken other wise than by the supplier".

Rule 138 prescribes penalty for breaking seal and reads as under :

138. Penalty for breaking seal. - Where, in contravention of Rule 56 any seal referred to in that rule is broken -

[a] the person breaking the seal shall be punishable with fine which may extend to two hundred reupees; and

[b] the consumer when he has not himself broken the seal shall be punishable with fine which may extend to fifty rupees unless he proves that he used all reasonable means in his power to ensure that the seal should not be broken."

On going through these Rules it is apparent that the findings about broken seal would lead to the penalty as prescribed under Rule 138. The first requirement as prescribed by Rule 56 is that a consumer is expected to use all reasonable means in his power to ensure that no seal affixed by the Board is broken. Rule 138 prescribes the penalty under clause (a) wherein the person breaking the seal is known; while clause (b) stipulates a situation wherein, even if the consumer himself has not broken the seal he becomes liable to the prescribed fine unless the consumer proves that he had used all reasonable means in his power to ensure that the seal should not be broken. Thus, this is one more factor which requires consideration before a charge of theft of energy is fastened on consumer. Merely by stating that the seal wires are broken or the seal wires of different seals differ from each other would not be sufficient by itself to establish that theft of energy had been committed by the consumer. The onus to ensure that the seal is not broken after having taken all reasonable care

is on the consumer and failure to discharge such onus can be visited with the prescribed fine. Therefore, the Scheme of the Act of 1910 read with the relevant Rules specifically provides that factum of broken seals is not equivalent to establishment of theft of energy. At best, such broken seals may be a relevant factor, but without anything more, cannot be conclusive.

27 It is not necessary for this Court to enter into an elaborate discussion as to what would constitute theft of energy by existence of artificial means or otherwise, but one can get a clue from the decision of this Court in the case of Patel Parshottamdas Vanmalidas vs. Gujarat Electricity Board and Another, reported in AIR 1987 188 wherein it was found that the consumer had been able to stop the running of the meter by insterting a plastic strip. This is only an illustration. Similarly in the case of Jagannath Singh (supra) this is what the Court stated while drawing distinction between provisions of Sections 39 and 44 of the Electricity Act,1910:

> "(8) An exposure of a stud hole on the meter cover is an artificial means for preventing the meter from duly registering. For the purpose of Section 44, the existence of this artificial means gives rise to the presumption that the meter was prevented from duly registering, but this presumption cannot be imported into S.39. A meter with an exposed stud hole without more is not a perfected instrument for unauthorised taking of energy, and cannot be regarded as an artificial means for its abstraction. To make it such an artificial means, the tampering must go further, and the meter must be converted into an instrument for recording less than the units actually passing through it. A check meter affords an easy method of proving that the consumer's meter is recording less than the units consumed and is being used as an artificial means for abstraction of the unrecorded energy. To bring home the charge under S.39, the prosecution must also prove that the consumer is responsible for the tampering. The evidence adduced by the prosecution must establish beyond doubt that the consumer is guilty of dishonest abstraction of energy".

Therefore, merely because there is an exposure of a stud hole without more, a presumption cannot be raised against the consumer that there was unauthorised user of energy by employing artificial means. These are the

aspects which have to be taken into consideration by the authority while adjudicating a case before it. The standard of proof need not be of the nature as required in criminal proceedings but has to be akin to that required in civil proceedings i.e. based on preponderance of probabilities.

28 The appellate authority is required to take into consideration that it is primarily required to record findings of fact after appreciating the evidence on record, and for this purpose it shall have to consider whether there is evidence, or whether it is a case of lack of evidence or a case of insufficient evidence. The rule of 'no evidence' as summarised by this Court in the case of Siddharth Mohanlal Sharma vs. South Gujarat University, 1982(1) GLR 233, has been succinctly stated in the following terms

"The English Courts have not construed the words 'no evidence' narrowly. The rule of 'no evidence' is there attracted not only in cases where there is complete lack of evidence, that is to say, where there is not a tittle or shred of evidence, but also in cases where the evidence, if any, is not capable of having any probative value, or on the basis of which no Tribunal could reasonably and logically come to the conclusion about the existence or non-existence of facts relevant to the determination. According to the English decisions, even though a domestic tribunal may act on evidence not admissible according to legal rules in a Court of law, unless such evidence has some probative value in the sense mentioned above, it would be a breach of natural justice and/or an error of law to found any adverse decision thereon.

The ' no evidence', rule has the same content and meaning in our country as in England. 'No evidence' does not merely signify total dearth of evidence, evidence which does not reasonably support the conclusion is also comprehended within the meaning of the said expression. In other words, cases where there is complete lack of evidence and cases where the evidence, if any, is incapable of rationally leading to the conclusion reached, are both treated on a par so far the applicability of the rule of 'no evidence' concerned. Mere suspicion, even if honestly and bona fide entertained on the basis of apparently cogent circumstances, is held to be

out of bounds even in domestic inquiries, where the principle that in punishing the guilty scrupulous care must be taken to see that the innocents are not punished, is found to apply as much as it applies to regular criminal trials. In the ultimate analysis, the test which must be applied is whether there is some material capable on having any evidential value. If not, the case must be held to fall within the mischief of the rule of 'no evidence' "

29 Though the appellate Committee is not a Court of Law and is not expected to function like a Civil Court it is necessary that it approaches the case before it by applying principles of natural justice and passing a reasoned order. As stated by the Supreme Court in the case of Punjab State Electricity Board and Another vs. Ashwani Kumar, reported in (1997) 5 SCC 120 :

"When the provision for appeal by way of review has been provided by the statutory instructions, and the parties are directed to avail of the remedy, the authorities are enjoined to consider all the objections raised by the consumer and to pass, after consideration, the reasoned order in that behalf, so that the aggrieved consumer, if not satisfied with the order passed by the Board/appellate authority, can avail of the remedy available under Article 226 of the Constitution. Therefore, by necessary implication, the appropriate competent authority should hear the parties, consider their objections and pass the reasoned order, either accepting or negativing the claim. Of course it is not like a judgment of a Civil Court xxxx "

This approach is all the more necessary because as laid down by this Court in the case of Shamji Ramji Vs. Deputy Engineer (O & M) GEB, Dwarka and others reported in 2000(4) GLR 3101, a consumer has no right to engage an Advocate to represent his case before the appellate authority.

30 In light of what is stated hereinbefore, it is apparent that in the present case the Board has failed to discharge the onus which lay upon it and the appellate committee has similarly failed to apply its mind to this aspect of the matter. The appellate order at Annexure "A" is therefore set aside. The petitioner, during the course of hearing, very fairly agreed that in light of the observations of this Court as regards the true scope

of term 'theft' and 'malpractice', it would willingly go before the appellate authority and present its case once again provided the appellate committee ensures that the Board supplies all the necessary data which the petitioner had requested for.

31 The impugned order dated 16.4.2002, and the consequential supplementary bill dated 8.5.2002 are hereby quashed and set aside. The appeal of the petitioner being Appeal No.A-7/2002 shall stand restored to file of the appellate committee. The appellate committee shall hear both the sides after giving full and proper opportunity to present the respective cases bearing in mind the relevant legal provisions and without being influenced in any manner whatsoever by the prior proceedings. The respondent Board shall not disconnect the power supply till the appeal is heard and finally disposed off and in case the petitioner is thereafter required to make any payment by reason of fresh supplementary bill the petitioner shall be granted reasonable time for meeting with its liability in such circumstances.

32 The view that has been taken and any observations made hereinbefore shall not be construed as findings in relation to merits of the matter as they are merely prima facie observations to point out the fallacy in the approach of the appellate committee.

33 The petition therefore, stands allowed to the aforesaid extent. Rule made absolute. There shall be no order as to costs.

(D.A.Mehta, J)

m.m.bhatt